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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 28

CLOVERLEAF BUTTER COMPANY; a Corporation,
Petitioner-Appellant,

vs.

HAYGOOD PATTERSON, as Commissioner of Agriculture & Industries of the State of Alabama, et al.,
Respondents.

PETITIONER'S REPLY BRIEF

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May It Please The Court:

In our brief we inadvertently omitted printing that part of the Renovated Butter Act making the sanitary provisions of the Meat Inspection Law and the Slaughtering and Meat Canning Act applicable to renovated butter. U. S. C. A., Title 26, §997 (b) (c) (d). §2327 (b) (c) (d) I. R. C. These sections of the law are set out in the appendix to this brief.

Counsel for respondents concede (their brief page 32) that Congress has authorized and required the Secretary of Agriculture to cause a rigid sanitary inspection to be made of packing stock butter in interstate com-

merce, but they insist that Congress has not preempted the regulatory field, and they, therefore, claim, that the State is free to regulate packing stock butter in interstate commerce, although it is conceded that the inspection of such butter is committed to the Secretary of Agriculture of the United States.

Inspection is a form of regulation. Conceding the correctness of respondents' immediate contention the all sufficient answer is, the State of Alabama has never attempted by statute or otherwise to regulate packing stock butter in intersate commerce, and in seizing packing stock butter in interstate commerce respondents are acting entirely beyond any authority conferred on them by any statute of the State of Alabama. *State vs. Cecil*, 216 Ala. 391.

Some opinions of the solicitors of the department are cited to support the respondents' contention that the Secretary of Agriculture has no authority to seize or condemn any raw material unfit for renovation which he discovers by the inspection he is required to make. A statement of the proposition would seem to answer it. Absurd results are avoided when possible in construing a statute. A construction that renders a statute nugatory is not favored. We might say that if such construction is adopted, the exercise of the duty and power conferred upon the Secretary of Agriculture as to such raw materials is, for practical purposes, a waste of time and money.

The opinion rendered by the solicitor August 14, 1914, Appendix to respondents' brief, page 23, shows that the solicitor did not consider the effect and declared

purpose of the 1912 amendment making the sanitary provisons of the Slaughterhouse and Meat Canning Act applicable to process or renovated butter factories. *Title 26, Section 997, U. S. C. A., 34 Stat. 676.*

If the respondents acting under the statutes relied upon in this case may seize packing stock butter in actual transit from Georgia to Alabama and in the petitioner's plant awaiting processing for sale and delivery in interstate commerce, then there is nothing to prevent them from going into any one of the numerous packing houses in Alabama and seizing animals before they are inspected by Federal authorities or even slaughtered.

The respondents' contention in effect amounts to this: It says that Congress has said to the Secretary of Agriculture when it comes to raw material in interstate commerce intended for manufacture into renovated butter, "you may go out and swim but don't go near the water." "You must make a rigid sanitary inspection of the materials; it is your duty to look into it carefully; perform your duty; look all you like and then go on. You can't do anything about it." There is a presumption that Congress would not participate in a ridiculous performance.

It would be charitable but inaccurate to say that the only thing wrong with the opinions set out in respondents' supplemental brief and the appendix to the brief is that they are flatly in conflict with an act of Congress. They go further in erroneous premise and conclusion. They are irreconcilably opposed to the practice and procedure of the Department and a well reasoned case by a United States Court.

AUTHORITY TO SEIZE RAW MATERIAL

Congress has decreed that the Secretary of Agriculture shall require raw material going into the manufacture of renovated butter to undergo a rigid sanitary inspection. Congress has also decreed that any raw material unfit to be renovated "shall be destroyed for food purposes in the presence of an inspector." *That mandate is incorporated into the renovated butter act by the provision making the provisions of the Meat Inspection Act applicable to the subjects described in Sec. 995, Title 26,* U. S. C. A. now Sec. 2325 I. R. C. One of the subjects described in said section is material going into the manufacture of renovated butter.

U. S. v. Green, 137 Fed. 179, is authority for the proposition that the only change necessary in order to adapt the Meat Inspection Act to the Renovated Butter Act is to eliminate the references therein to meat and packing esablishments and to substitute in lieu thereof materials going into the manufacture of renovated butter and renovated butter factories. If Sec. 72, Title 21, U. S. C. A. (Meat Inspection Law) is so treated, it destroys respondents' contention that the Secretary of Agriculture has no authority to seize and destroy raw material unfit for renovation. Said Section is set out in the appendix as adapted to the Renovated Butter Act.

The opinions are contrary to the practice and procedure in the Department. In the relevant part of the Twentieth Annual Report of the Chief of Bureau to the Secretary of Agrculture (set out in the appendix) it was said:

"Occasionally a lot of packing stock is found in such a condition of filth or putrefaction as to necessitate condemnation. In two instances material of this character has been manufactured before being seen, so the finished product had to be condemned as unfit for food. In such cases inspectors have required *that material* and product be disposed of as grease."

In the same report of the Bureau of Animal Industry, commencing on page 177 is an interesting chapter entitled: FACTS CONCERNING THE HISTORY, COMMERCE AND MANUFACTURE OF BUTTER, by Harry Hayword, M. S. Ass't Chief Dairy Division. Under the topic BUTTER SUBSTITUTES (page 193) it is said:

"At the present time there are three commercial substitutes for butter as it comes from the creamery or dairy churn. These are oleomargarine, butterine and renovated butter. These substitutes are manufactured and sold under the surveillance of the United States Government, and are subject to special taxes. * * * * *

"Renovated Butter is made 'from one or more lots of butter which have been subjected to any process by which it is melted, clarified, or refined' for the purpose of removing rancidity, or any deleterious flavors, *or of otherwise improving and rendering uniform miscellaneous lots of butter which could not find a profitable market without being subjected to some such process of renovation.* It is understood that renovated butter is pure butter, *but is made from stock that in itself is not fit for table use.* The purpose of Government surveil-

lance is to see that regulations are observed *whereby no unwholesome material* or process *is used* and so that the purchaser and consumer are advised as to the true character of this kind or grade of butter."

Twenty-First Annual Report of the Bureau of Animal Industry. This report was transmitted by D. E. Salmon, Chief of Bureau, to Hon. James Wilson, Secretary of Agriculture, under date of May 22, 1905.

Under the heading "Work in the Interest of Dairy" (Sub-topic "Inspection of Renovated Butter," among other things it is stated:

(p. 32) "The Treasury Department has reported 74 different factories having been licensed and bonded during the year for the manufacture of renovated butter, as against 82 for the year before. These were located in 14 States and the District of Columbia. Thirty-four of the factories have been in operation throughout the year; 9 commenced operations in July 1903, but ceased manufacturing before the close of the year, and 18 began operating subsequent to July and continued until the end of June, 1904. One factory which was licensed did not operate."

(p. 33) "The average quality of renovated butter is still improving. The difference in general character between the product of the past year and the same commodity a few years ago is very marked. * * * * *Occasionally a lot of packing stock is in such a condition of filth or putrefaction as to necessitate condemnation.* In still rarer cases the manufactured product is found so bad, because of bad materials, ignorance or negligence in renovat-

ing, or as the effect of age, as to make it unfit for food: *In a few such instances the sanitary inspection required by law and made by this Department has caused the objectionable materials to be removed from the food market and sold as grease.* But, as stated, such instances are very exceptional."

These reports show that the Secretary of Agriculture destroys raw material unfit for renovation wherever he discovered it.

The opinions relied on are in conflict with *U. S. v. Green,* supra. The Green case held that even the penal provisions of the Meat Inspection Act were transplanted to and incorporated in the Renovated Butter Act.

Mr. Kelly's letter on page 15 in the last Appendix to respondents' brief relates to a proposed amendment to the Renovated Butter Act and not to the Act of 1902 as amended in 1912. The renovated butter industry regards that letter as entirely irrelevant to this case. The industry has at all times taken the position, so far as we are advised, that the Secretary of Agriculture of the United States has ample authority to inspect the raw material and to cause any raw material unfit for renovation to be destroyed. The petitioner has no objection to the Secretary of Agriculture exercising that authority. No additional legislation on the subject is necessary.

Mr. Kelly's statement that "it is axiomatic that despite the process through which butter or butter oil pass during the course of manufacturing renovated butter, certain soluble materials unfit for human consumption cannot be removed and it is difficult if not impossible to detect them in the finished product" will be denied

and challenged by every scientist of experience with modern methods of renovating butter. Likewise his statement that "a lot of butter may be infested with maggots and should be condemned for use in the manufacture of renovated butter" may be true where the infestation is so extensive as to render the raw material unfit for renovation, but the presence of one maggot in a barrel of butter furnishes no basis for condemning the barrel of butter as the most renowned experts in the country have abundantly demonstrated and the U. S. District Court has ruled.

U. S. v. 9 Barrels of Butter, 241 Fed. 499.

Mr. Kelly's conclusion that the animal fat from these maggots will be mixed with the butter fat in a way that renders their removal impossible is at war with science itself. It ignores the effect of centrifugation, pasteurization, sterilization, evaporation, and the exposure of animal fat to high temperature for a long time.

Germany is now manufacturing good butter from coal according to recent authoritative scientific pronouncements in this country. Doubtless Mr. Kelly would frown on an operation of that kind but we may come to that before the war is over.

An opinion in conflict with an act of Congress, a Court decision, and at war with science itself, is of doubtful value. Manifestly such opinions cannot override an act of Congress.

One basic trouble with the departmental opinions cited by respondents is that they read the Renovated

Butter Act as if the sanitary provisions of the Meat Inspection Act were not incorporated in the butter law. Congress framed our Federal Law to the contrary.

AUTHORITY TO REQUIRE A SANITARY PLANT

The opinion of assistant Department Solicitor Boyle is cited to sustain the proposition that the Secretary of Agriculture has no way under existing law to compel an operator to improve the sanitary condition of his factory.

If that be true, why the elaborate regulations about the sanitary conditions of the plant in Regulation No. 9, which requires the air to be filtered, the clothing to be spotless, the employees to be healthy, the sanitary fixtures to be located at a specified place, screens and precautions against dust and dirt and foreign matter? Has the Secretary of Agriculture done a vain and useless thing?

The assistant solicitor evidently overlooked Subsection (c) in Sec. 997 making the SLAUGHTER AND MEAT CANNING ACT applicable to RENOVATED BUTTER FACTORIES, whereas the meat inspection act is applicable to the subjects in Sec. 995.

What is the effect of making the Slaughter and Meat Canning Act applicable to renovated butter *factories?* Following the rule in the Green case, and substituting renovated butter factories for slaughter houses, we would have Sec. 74 of the Meat Inspection Act modi-

fied to make it applicable to renovated butter, incorporated in the Renovated Butter Law reading thusly:

> "The Secretary of Agriculture shall cause to be made by experts in sanitation, or by other competent inspectors, such inspection of all renovated butter factories or similar establishments in which renovated butter is prepared for interstate or foreign commerce, as may be necessary to inform himself concerning the sanitary conditions of the same and to prescribe the rules and regulations of sanitation under which such establishments shall be maintained; and where the sanitary conditions of any such establishment are such that renovated butter is rendered unclean, unsound, unhealthful, unwholesome, or otherwise unfit for human food, he shall refuse to allow said renovated butter to be labeled."

What effect does that have? Just this and no more. *The shipment of unlabeled renovated butter is punishable by fine and imprisonment. 32 Stat. 197.*

In this connection it is well to refer to the fact that the duty of the Secretary of Agriculture is not merely to inspect. It is, also, to prescribe the rules and regulations for carrying the provisions of the Meat Inspection Act and the Slaughter and Meat Canning Act—incorporated by express provision in the renovated butter law—providing for the destruction of material deleterious to health or unwholesome in the finished product and for the highest sanitary standard in the factory itself into effect. Congress set the standard for the material. That action precluded the respondents from attempting to impose or enforce any other standard.

The question of the sanitary condition of the plant is not raised in this case. The solicitor's opinion recognizes that the department can condemn unwholesome finished products intended for sale in interstate commerce.

LEGISLATIVE HISTORY

When the amendment to the Renovated Butter Act was before the House Committee on Agriculture in 1912 (House Bill 18960) it was insisted by representatives of the Secretary of Agriculture that the extension of the Meat Inspection Law, which itself had been previously strengthened, (34 Stat. p. 676) to the Renovated Butter Act, would confer all needed and desired authority on the Secretary of Agriculture to seize and condemn raw material unfit for renovation and unwholesome finished product. *Congressional Record; 62nd Congress, pages 2690-2691.* It was urged that it was so important to extend the recently strengthened meat inspection laws to the Renovated Butter Act that it should be done regardless of the fact that the amendment was subject to a point of order. (Congressional Record, 62nd Congress, pp. 2690-2691). The House sustained the point of order; the Senate restored the provisions and extended the provisions of the meat inspection law to the Renovated Butter Act and the House concurred in the amendment. Congressional Record, 62nd Congress, pp. 10478, 10500.

This legislative history disposes of the contention that the Secretary of Agriculture is without authority to

seize raw material unfit for renovation and demonstrates the error underlying this contention in the respondents' brief.

If, however, it should be held that we are mistaken as to the force and effect of the legislative history of the 1912 amendment and the meaning and import of the words employed in Section 5 of the Act of 1902 as well as the amendment of 1912, then we respectfully submit that it conclusively appears that Congress regulated renovated butter in interstate commerce. It also recognized packing stock butter as a legitimate article of commerce, and it would seem to follow under such circumstances that Congress intended to make the wholesomeness of the finished product and its suitability as food the test of its right to enter the channels of interstate commerce. Congress unquestionably had the right to regulate packing stock butter and renovated butter in interstate commerce. If it regulated the finished product by making its wholesomeness and suitability as food the test and recognized the raw material as a legitimate article of commerce, it necessarily follows that it was the intention and purpose of Congress that packing stock butter should be first processed and its wholesomeness and suitability made the test of its right to enter the channels of interstate commerce, after renovation was completed.

There would be nothing unreasonable in a Congressional regulation of that kind. The public is abundantly protected as long as the finished product containing anything unwholesome or deleterious to health is excluded from interstate commerce. If Congress adopted

that method of protecting the public the State has no authority to supplement the efforts of Congress or to enforce other methods so far as interstate commerce is concerned.

The State cannot question the efficacy or sufficiency of Congressional regulations. Congress having entered into the regulation of the finished product must be deemed to have determined that the method provided was sufficient and that no other method is necessary.

Missouri Pacific RR Co. v. Porter, 273 U. S. 341.
McDermott v. Wisconsin, 228 U. S. 115.
Napier v. Atlantic Coast Line, 272 U. S. 605.

The sum and substance of the respondents' contention is that the Federal law as it now stands means that packing stock butter may be first processed before it is liable to seizure and if seized at all it must be seized after conversion into the finished product.

Conceding that to be true we insist it is not within the province of these state officers to say, in effect: "We don't care if Congress has declared that it may be processed before it is subject to seizure; it makes no difference if it is in interstate commerce; we will not permit you to process it. We are going to seize and condemn it, congressional provision to the contrary notwithstanding."

NO STATUTORY PROTECTION

On page 48 of their brief in Note 27, respondents call attention to Title 2, Section 314 of the Alabama Agri-

cultural Code of 1940 which, in effect, declares that the possession of adulterated or misbranded food is prima facie evidence of having it in possession with intent to sell such food in violaton of the Alabama laws, *except a manufacturer, wholesaler or purchaser may keep properly identified goods specially set apart for sale in other states which might otherwise be in violation of the provisions of the article,* and it is intimated that the exception in the Alabama Code of 1940, which became effective after this case was tried by the Circuit Court of Appeals and after the certiorari in this case was granted, will afford full protection to petitioner's raw material in interstate commerce.

Title 2, Section 314 of the Alabama Code of 1940 was taken from the Alabama Food and Drug Act of 1919. Alabama General Acts 1919, p. 1031. The provisions in this section were not incorporated in the Alabama Agricultural Code of 1927 and were not in force and effect prior to the issuance of the writ of certiorari in this case. For that reason we say said statute has no place in this case. However, the contention that it will afford full protection to petitioner's raw material in interstate commerce is inconsistent with the tenor of the rest of the argument made in brief of respondents. They are vigorously insisting that they have the right to seize the raw material in interstate commerce because they say Congress has not entered the field of regulation of raw material in interstate commerce.

Section 314, Title 2 of the Alabama Code of 1940 demonstrates that when the Legislature of Alabama adopted a new code it consistently followed its previous

policy by incorporating a provision therein evidencing its intent not to extend the operation of Alabama laws into the field of interstate commerce.

If the respondents can stop a truck loaded with packing stock butter moving in interstate commerce and seize the raw material then in transit (which the bill shows occurred a few days before the suit was filed R. p. 11) or if they may seize such packing stock butter in the plant immediately upon its arrival, before reasonable opportunity is afforded to specially set it apart and properly identify it, the provision that the Alabama Legislature incorporated in the Alabama Code evidencing its intention not to extend the operation of Alabama laws into the field of interstate commerce, affords the petitioner no protection.

The trouble in this case is not with the law of Alabama. The Alabama Legislature has made it plain that it has no intention of extending the operation of the Alabama statutes into the field of interstate commerce. The trouble is with the respondents. They have attempted to place their own construction on the Alabama statute, a construction that is not supported by the language employed by the Legislature or the interpretation accorded the language by the highest court in Alabama. Unless restrained respondents will continue the same course and continue to place an unwarranted construction on the Alabama statute, and continue to usurp the function and authority delegated by the Federal statute to the United States Secretary of

Agriculture. In such a situation the petitioner is entitled to relief.

General Oil Co. vs. Crane, 209 U. S. 211.
Smyth v. Ames, 169 U. S. 466.
Ragan v. Farmers Loan & Trust Co., 154 U. S. 362.

THE CRUX OF THE CASE

Respondents claim the authority to stop a truck, loaded with packing stock butter, moving in interstate commerce, from Georgia to Alabama, en route to petitioner's plant, and before interstate movement is completed by delivery of the product, to seize it and destroy it, *if they claim it is not fit for table use*. Neither State nor Federal law confers any such authority on them.

If this is the law, then it is the end of the Renovated Butter Business. Everybody, everywhere, under all circumstances, has always recognized that most renovated butter is made from stock not fit for table use in its then condition. Standard butter needs no renovation.

To deny petitioner's right to engage in the business of bringing sub-standard butter up to standard, is to deny it the right to engage in a gainful, lawful, useful, harmless, occupation. To deny it the right to transport sub-standard butter in interstate commerce intended solely for renovation, is in effect denying it the right to engage in the business of bringing sub-standard butter up to standard.

If respondents prevail, petitioner must cease renovat-

ing butter in Alabama. That State is the only State in which State officers claim the authority to stop interstate trucks loaded with packing stock butter for the purpose of seizing it if they claim it is not fit for table use. The irony of it is, that the packing stock butter now being brought to Birmingham for renovation, from states outside Alabama, can now be renovated in Atlanta by petitioner's competitor, and shipped into Alabama as a finished product free from deleterious or unwholesome material. And the Alabama farmer will find himself without a profitable market for his country butter. All because over-zealous officials seek to exercise more authority than the law has conferred on them.

Assuming merit in the contention that Congress did not authorize the seizure of raw material unfit for renovation the fact remains that the material and finished product have been regulated by Congress. With all of the facts before it and an intimate acquaintance with the character of raw material going into the manufacture of renovated butter, Congress recognized such material as a legitimate article of commerce. The State of Alabama does the same thing. If Congress was of the opinion that the regulation it prescribed was sufficient, that is to say if Congress was of the opinion that regulations short of seizure of such material were sufficient, the resopndents are still precluded from supplementing Congressional action.

> "That Congress has ample power in this connection is no longer open to question. That body has the right not only to pass law which shall regulate

legitimate commerce among the States and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce and to bar them from the facilities and privileges thereof. Congress may itself determine the means appropriate to this purpose, and so long as they do no violence to other provisions of the Constitution it is itself the judge of the means to be employed in exercising the powers conferred upon it in this respect. *McCulloch v. Maryland*, 4 Wheat. 316,421; *Lottery Case*, 188 U. S. 321, 355; *Hipolite Egg Co. v. United States*, 220 U. S. 45; *Hoke v. United States*, 227 U. S. 308.

"The Food and Drugs Act was passed by Congress under its authority to exclude from interstate commerce impure and adulterated food and drugs and to prevent the facilities of such commerce being used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and of the power exerted in its passage by Congress that this act must be considered and construed. Hipolite Egg Co. v. United States, supra."

McDermott v. Wisconsin, 228 U. S. 115.

See also:

Napier v. A. C. L., 272 U. S. 606.

The renovated butter act was passed by Congress under its authority "to exclude from interstate commerce impure and adulterated food and to prevent the facilities of such commerce being used to enable such articles

to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and of the power exerted in its passage by Congress that this act must be considered and construed."

AUTHORITIES CITED BY RESPONDENTS

McCray vs. U. S., 195 U. S. 27.

On pages 13-14 of their brief, respondents seem to contend that the decision rendered by this Court in the case of McCray vs. U. S., 195 U. S. 27 construed section 5 of the Renovated Butter Act of 1902, and that by such construction it was held to be a revenue measure. Any such contention is erroneous.

The McCray case involved only one question, viz: the constitutionality of section 2 of the Act of 1902 fixing a tax of ten cents per pound on *oleomargarine* with the provision that when such product was free from artificial coloration that causes it to look like butter of any shade of yellow, the tax should be one-fourth of one cent per pound.

The sections of the Act relating to process or renovated butter were in no manner involved and no construction of them was undertaken.

The appellant urged many reasons why the ten cents per pound tax was unconstitutional. The Court, speaking through Mr. Justice White disposed of these arguments and upheld the tax on oleomargarine.

The full title of the Act of 1902 is set out in the opin-

ion, and after quoting the pertinent section, Mr. Justice White said:

> "The section in question, as well as those following it, contains many administrative provisions for the enforcement of the taxes levied by the act, *and concerning interstate and foreign commerce in the articles referred to.*"

In the further course of the opinion, Mr. Justice White made the following statement which is here applicable.

> "Of course, where a State law is assailed as repugnant to the Constittuion of the United States, and on its face, such act was seemingly within the power of the State to adopt, but its necessary effect and operation is to usurp a power granted by the Constitution to the government of the United States, it must follow from the paramount nature of the Constitution of the United States the act is void."

The gist of the opinion was that the act was not an unconstitutional exercise of power by Congress: That as Congress had the power to levy such tax, the judicial department had no authority to inquire into the motives which entered into its passage or its effect on the oleomargarine business.

> *Eichholz vs. Public Service Commission*, 306 U. S. 268.

In this case the Court ruled that the State act under consideration had not been superseded by the Federal

Motor Carrier Act. The carrier's permit was revoked because the carrier evaded the state law. The interstate commerce in theory was intra-state commerce in fact.

Plumlee v. Mass., 155 U. S. 461.

This case involved *a local sale* and violation of *local law* on colored oleomargarine. The statute did not prohibit the sale of oleomargarine. It was held that the state had not surrendered its power to prevent fraud in the local sale of property.

Cary v. South Dakota, 250 U. S. 118.

It was held in this case that the state law prohibiting shipment of wild ducks was not superseded by the Federal Migratory Bird Law which only prohibited killing of birds during closed season but did not prohibit their shipment at any time.

H. P. Welch & Co. v. New Hampshire, 306 U. S. 79.

The Court held that the 12 hour law for truck drivers was not superseded by Federal legislation *at the time the act complained of occurred*, but the Court pointed out in its opinion that it assumed that subsequent Federal legislation would supersede the state law when the Federal law became effective. (p. 84).

Maurer v. Hamilton, 309 U. S. 598.

It was held that a State law prohibiting any vehicle from carrying another vehicle above the head of the driver related to "sizes and weights" and was not superseded by the Federal Motor Carrier Act which did not cover the field of sizes and weights, *which field was left to the State by Section 225 of the Federal Motor Carrier Act.*

Whipple v. Martinson, 256, U. S. 41.

It was held that a State statute prohibiting a physician from furnishing narcotics to habitual users *out of stock kept on hand by the physician* was not superseded by the Harrison Narcotic Act which did not deal with a physician furnishing narcotics to habitual users out of stock on hand. *No element of interstate commerce was involved.*

Hartford Accident & Indemnity Co. v. Illinois, 298 U. S. 156.

It was ruled that the statute regulating commission merchants affected interstate commerce *only indirectly*. The State act required a bond. The Federal act did not require a bond, but *provided in express language that State acts were to remain in effect unless inconsistent with the Federal acts.*

Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311.

It was decided that Congress may prohibit the transportation of liquor in interstate commerce under its

power to regulate interstate commerce, and having the power to prohibit the transportation of liquor Congress may subject it to State laws prohibiting its movement within a State.

United States vs. 1150 Lbs. Butter, 195 Fed. 657.

It was held that the burden was on the Government to show some process or material used in manufacturing with the intent of introducing an abnormal quantity of moisture in the butter; that the Secretary of Agriculture could not make the mere presence of an abnormal (16%) quantity of moisture in butter a violation of a statute that required an act to be done with a specified intent.

When the statutes involved are considered and decisions cited by respondents are analyzed it will appear that there is no conflict between the cases relied on by the respondents and the so-called "railroad cases."

SECTION 1 OF THE RENOVATED BUTTER ACT DOES NOT SUBJECT PACKING STOCK BUTTER TO STATE LAW

Counsel for the respondents take the position, page 22 of their brief, that Section 1 of the Renovated Butter Act making renovated butter transported into a State and remaining therein for *use, consumption, sale or storage* therein subject to the laws of the State to the same extent and in the same manner as though such butter had been produced in such State, is an indication

of the will of Congress that the State might inerfere with packing stock butter in interstate commerce.

It is respectfully submitted that the statute is not subject to any such interpretation.

In the first place, the aforesaid provision in Section 1 was taken bodily from the Wilson bill construed in *Rhodes v. Iowa*, 170 U. S. 412 wherein this Court held that a statute subjecting imports to State police power is operative only after the contract of shipment is consummated by delivery and does not authorize an interference with the articles subject to State police power until its interstate character is terminated.

Under recent decisions of this Court enlarging upon the interstate commerce clause in the Constitution of the United States it logically follows that packing stock butter in interstate commerce cannot be interfered with by State authorities until it is renovated into finished product, and kept or offered for sale in Alabama.

Labor Board v. Jones & Laughlin, 301 U. S. 1.
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282.
Currin v. Wallace, 306 U. S. 1.

In the next place Section 1 is applicable to the finished product and not to raw material and does not apply to the finshed product unless the finished product remains in the State for use, consumption, sale or storage therein. The plain purpose and object of this provision in Section 1 was to get around the "original package" doctrine.

The argument that the aforesaid construction of Sec-

tion 1 would enable a manufacturer in a particular state to import packing stock butter unfit for renovation and use it in the manufacture of renovated butter free from State inspection or Federal seizure, ignores the mandatory provisions in the Renovated Butter Act requiring the Secretary of Agriculture to make a rigid sanitary inspection of the raw materials going into the manufacture of renovated butter and the applicable provisions of the Meat Inspection Law requiring the destruction of raw material unfit for renovation in the presence of an agent of the Secretary of Agriculture.

If the respondents are correct and we are mistaken about the meaning and effect of the language in Section 1 we still remind the Court that the Alabama statutes do not purport to extend to the field of interstate commerce and do not authorize any interference with packing stock butter in interstate commerce.

CONCLUSION

1. By a stipulation in writing incorporated in the record the parties agree that this case involves questions of law only. (R. p. 36) It appears without challenge or dispute that the packing stock butter seized by the respondents was in interstate commerce at the time it was seized.

2. No statute of the State of Alabama extends to interstate commerce.

3. Congress has required the Secretary of Agriculture of the United States to make a rigid sanitary inspection of the packing stock butter going into the man-

ufacture of renovated butter. By statute Congress requires the destruction of packing stock butter found by the Secretary of Agriculture on inspection to be unfit for renovation. We, therefore, respectfully submit that Congress has completely and exclusively occupied the field.

But even if it has not, no statute of the State of Alabama authorizes the respondents to invade it as they have done and threaten to continue. The action of the respondents is contrary to and in defiance of the authority conferred upon the Secretary of Agriculture of the United States and without support in the statutes of the State of Alabama.

For these reasons the decision of the Circuit Court of Appeals for the Fifth Circuit should be reversed and the cause remanded.

Respectfully submitted.

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APPENDIX

FEDERAL STATUTES APPLICABLE TO RENOVATED BUTTER

PERTINENT PROVISIONS OF THE MEAT INSPECTION LAW

SEC. 72 U. S. C. A., TITLE 21, ADAPTED TO RENOVATED BUTTER

RELEVANT PARTS OF REPORT OF THE BUREAU OF ANIMAL INDUSTRY

FEDERAL STATUTES APPLICABLE TO RENOVATED BUTTER

Title 26, U. S. C. A. Sec. 997 (b), (c) and (d), Sec. 2327 (b), (c) and (d), I. R. C.

"(b) *Inspection of live cattle and meat.* All parts of sections 71 to 93 of Title 21, which are applicable to the subjects and purposes described in section 995 shall apply *to process or renovated butter.* (May 9, 1902, c. 784, Sec. 5, 32 Stat. 196.)

"(c) *Slaughtering and meat canning.* The sanitary provisions for slaughtering, meat canning, or similar establishments as set forth in sections 71 to 93 of Title 21, shall be extended to cover *renovated butter factories* as defined in this subchapter, under such regulations as the Secretary of Agriculture may prescribe. (Aug. 10, 1912, c. 284, 37 Stat. 273.)

"(d) *Tobacco and snuff.* The provisions of law governing the engraving, issuing, sale, accountability, defacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, shall apply to the stamps provided in section 991 (c) (1). (May 9, 1902, C. 784, Sec. 4, 32 Stat. 194.)

PERTINENT SECTIONS MEAT INSPECTION LAWS

United States Code Annotated, Title 21, Sections 72-79.

72. Post-mortem examination of carcasses and marking or labeling; destruction of carcasses condemned; reinspection. For the purpose hereinbefore set forth the Secretary of Agriculture shall cause to be made by in-

spectors appointed for that purpose a post mortem examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine, and goats to be prepared for human consumption at any slaughtering, meat canning, salting, packing rendering, or similar establishment in any State, Territory, or the District of Columbia for transportation or sale as articles of interstate or foreign commerce; and the carcasses and parts thereof of all such animals found to be sound, healthful, wholesome, and fit for human food shall be marked, stamped, tagged, or labeled as "Inspected and passed"; and said inspectors shall label, mark, stamp or tag as "Inspected and condemned" all carcasses and parts thereof of animals found to be unsound, unhealthful, unwholesome, or otherwise unfit for human food; and all carcasses and parts thereof thus inspected and condemned shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any such establishment which fails to so destroy any such condemned carcass or part thereof, and said inspectors, after said first inspection, shall, when they deem it necessary, reinspect said carcasses or parts thereof to determine whether since the first inspection the same have become unsound, unhealthful, unwholesome, or in any way unfit for human food, and if any carcass or any part thereof shall, upon examination and inspection subsequent to the first examination and inspection, be found to be unsound, unhealthful, unwholesome, or otherwise unfit for human food, it shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy any such condemned carcass or part thereof.

73. Examination of carcasses brought nto slaughtering or packing establishments, and of meat food prod-

ucts issued from and returned thereto. The foregoing provisions shall apply to all carcasses or parts of carcasses of cattle, sheep, swine, and goats, or the meat or meat products thereof which may be brought into any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and such examination and inspection shall be had before the said carcasses or parts thereof shall be allowed to enter into any department wherein the same are to be treated and prepared for meat food products; and the foregoing provisions shall also apply to all such products, which, after having been issued from any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, shall be returned to the same or to any similar establishment where such inspection is maintained.

74. Inspectors of meat food products; marks of inspection; destruction of condemned products; products for export. For the purpose hereinbefore set forth the Secretary of Agriculture shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all meat food products prepared for interstate or foreign commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and for the purposes of any examination and inspection said inspectors shall have access at all times, by day or night, whether the establishment be operated or not, to every part of said establishment; and said inspectors shall mark, stamp, tag, or label as "Inspected and passed" all such products found to be sound, healthful, and wholesome, and which contain no dyes, chemicals, preservatives, or ingredients which render such meat, or meat food products unsound, unhealthful, unwholesome, or unfit for human food; and said inspectors shall label, mark, stamp, or tag as "Inspected and condemned" all such products found unsound, unhealthful, and unwholesome, or which contain dyes, chemicals, preservatives, or ingredients which render such meat or

meat food products unsound, unhealthful, unwholesome, or unfit for human food, and all such condemned meat food products shall be destroyed for food purposes, as hereinbefore provided, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy such condemned meat food products: Provided, That subject to the rules and regulations of the Secretary of Agriculture the provisions of this section in regard to preservatives shall not apply to meat food products for export to any foreign country and which are prepared or packed according to the specifications or direction of the foreign purchaser, when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is to be exported; but if said article shall be in fact sold or offered for sale for domestic use or consumption then this proviso shall not exempt said article from the operation of all the other provisions of sections 71 to 94 inclusive, of this title.

75. Labeling receptacles or coverings of meat or meat food products inspected and passed; supervision by inspectors; sales under false names; trade names. When any meat or meat food product prepared for interstate or foreign commerce which has been inspected as hereinbefore provided and marked "Inspected and passed" shall be placed or packed in any can, pot, tin, canvas, or other receptacle or covering in any establishment where inspection under the provsions of sections 71 to 94, inclusive, of this title is maintained, the person, firm, or corporation preparing said product shall cause a label to be attached to said can, pot, tin, canvas, or other receptacle or covering, under the supervision of an inspector, which label shall state that the contents thereof have been "inspected and passed" under the provisions of such sections; and no inspection and examination of meat or meat food products deposited or inclosed in cans, tins, pots, canvas, or other receptacle or

covering in any establishment where inspection under the provisions of such sections is maintained shall be deemed to be complete until such meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector, and no such meat or meat food products shall be sold or offered for sale by any person, firm or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted.

76. Sanitary inspection and regulation of slaughtering and packing establishments; rejection of meat or meat food products unfit for food. The Secretary of Agriculture shall cause to be made, by experts in sanitation or by other competent inspectors, such inspection of all slaughtering, meat canning, salting, packing, rendering, or similar establishments in which cattle, sheep, swine, and goats are slaughtered and the meat and meat food products thereof are prepared for interstate or foreign commerce as may be necessary to inform himself concerning the sanitary conditions of the same, and to prescribe the rules and regulations of sanitation under which such establishments shall be maintained; and where the sanitary conditions of any such establishment are such that the meat or meat food products are rendered unclean, unsound, unhealthful, unwholesome, or otherwise unfit for human food, he shall refuse to allow said meat or meat food products to be labeled, marked, stamped, or tagged as "inspected and passed".

77. Examination of cattle and food products thereof, slaughtered and prepared during nighttime. The Secretary of Agriculture shall cause an examination and inspection of all cattle, sheep, swine, and goats, and the food products thereof, slaughtered and prepared in the

establishments hereinbefore described for the purposes of interstate or foreign commerce to be made during the nighttime as well as during the daytime when the slaughtering of said cattle, sheep, swine, and goats, or the preparation of said food products is conducted during the nighttime.

78. Transportation of carcasses, meat, or meat food products not properly inspected and marked. No person, firm, or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to any place under the jurisdiction of the United States, or to any foreign country, any carcasses or parts thereof, meat, or meat food products thereof which have not been inspected, examined, and marked as "Inspected and passed," in accordance with the terms of sections 71 to 94, inclusive, of this title, and with the rules and regulations prescribed by the Secretary of Agriculture.

79. Forgery, alteration or unauthorized use of marks, labels, or other identification devices or certificates. No person, firm, or corporation, or officer, agent, or employee thereof, shall forge, counterfeit, simulate, or falsely represent, or shall without proper authority use, fail to use, or detach, or shall knowingly or wrongfully alter, deface, or destroy, or fail to deface or destroy, any of the marks, stamps, tags, labels, or other identification devices provided for in section 71 to 94, inclusive, of this title, or in and as directed by the rules and regulations prescribed hereunder by the Secretary of Agriculture on any carcasses, parts of carcasses, or the food product, or containers thereof, subject to the provisions of such sections or any certificate in relation thereto, authorized or required by such sections or by the said rules and regulations of the Secretary of Agriculture.

SEC. 72, TITLE 21, U. S. C. A. ADAPTED TO RENOVATED BUTTER

§ 72 *Meat Inspection Law*

72. Post mortem examination of carcasses and marking or labeling; destruction of carcasses condemned; reinspection. For the purpose hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose a post mortem examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine, and goats to be prepared for human consumption at any slaughtering, meat canning, salting, packing, rendering, or similar establishment in any State, Territory, or the District of Columbia for transportation or sale as articles of interstate or foreign commerce; and the carcasses and parts thereof of all such animals found to be sound, healthful, wholesome, and fit for human food shall be marked, stamped,

(Continued on next page)

§ 72 *Adapted to Renovated Butter*

"72. Examination of material and marking or labeling; destruction of material condemned; reinspection. For the purpose hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose an examination and inspection of all raw material going into the manufacture of renovated butter to be prepared for human consumption at any renovating butter factory, or similar establishment in any State, Territory, or the District of Columbia for transportation or sale as articles of interstate or foreign commerce; and the material and parts thereof of all such material found to be sound, marked, stamped, tagged, or labeled as 'Inspected and passed'; and said inspectors shall label, mark, stamp or tag as 'Inspected

(Continued on next page)

tagged, or labeled as "Inspected and passed"; and said inspectors shall, label, mark, stamp or tag as "Inspected and condemned" all carcasses and parts thereof of animals found to be unsound, unhealthful unwholesome, or otherwise unfit for human food; and all carcasses and parts thereof thus inspected and condemned shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any such establishment which fails to so destroy any such condemned carcass or part thereof, and said inspectors, after said first inspection, shall, when they deem it necessary, reinspect said carcasses or parts thereof to determine whether since the first inspection the same have become unsound, unhealthful, unwholesome, or in any way unfit for human food, and if any carcass or any part thereof shall, upon examination and inspection subsequent to the first ex-

and condemned' all material found to be unsound, unhealthful, unwholesome, or otherwise unfit for manufacture into human food; and all material thus inspected and condemned shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any such establishment which fails to so destroy any such condemned material, and said inspectors, after said first inspection, shall, when they deem it necessary, reinspect said material to determine whether since the first inspection the same have become unsound, unhealthful, unwholesome, or in any way unfit for manufacture into human food, and if any material shall, upon examination and inspection subsequent to the first examination and inspection, be found to

amination and inspection, be found to be unsound, unhealthful, unwholesome, or otherwise unfit for human food, it shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy any such condemned carcass or part thereof.

be unsound, unhealthful, unwholesome, or otherwise unfit for manufacture into human food, it shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy any such material."

The Twentieth Annual Report of the Bureau of Animal Industry was made by D. E. Salmon, Chief of Bureau to Hon. James Wilson, Secretary of Agriculture, under date of May 10, 1904.

The following excerpts are taken from the topic:

"THE WORK OF THE DAIRY DIVISION"

(P. 33) "The chief distinction between the work of the Dairy Division during the fiscal year ended June 30, 1903, and that of preceeding years has been the additional duty assgned to it in connection with the administration of those parts of the Act of Congress approved May 9, 1902, under which certain duties devolve upon the Secretary of Agriculture concerning the manufacture, interstate commerce, and export of renovated butter.

"In preparation for this service a code of regulations for the execution of the law stated, and required by its provisions, was formulated by a joint board composed of representatives of the two Executive Departments concerned, and approved by the Secretary of the Treasury and the Secretary of Agriculture. These regulations were published in the form of Bureau of Animal Industry Order No. 98, dated June 21, 1902, and republished, slightly amended, as Bureau of Animal Industry Order No. 98, dated November 1, 1902.

"So far as they relate to the Department of Agriculture, these regulations are intended for the proper enforcement of the provision and manifest purposes of section 5 of said Act; they contemplate the sanitary inspection of materials, factories and processes necessary to insure a sound and wholesome product and methods of packing and marking the same which will preserve its commercal identity and make renovated butter known to all buyers as distinct from other kinds or grades of butter. The marks, labels or brands required

for this commodity are the same when the subject of interstate commerce as when exported from the United States.

"Various questions have arisen regarding the interpretation and application of these regulations, and for a time there were strenuous efforts made to have them modified. The Secretary of Agriculture, after hearing the various parties concerned and giving full consideration to the subject, decided there was no sufficient cause for change. The regulations promulgated in November are still in force, and during the last few months there have been no remonstrances or complaints regarding them.

"The work of inspecting renovated butter factories and markets was at first assigned to the three inspectors of dairy exports already employed and two additional inspectors temporarily employed for the purpose. It was soon found necessary to double this force, and through the instrumentality of the United States Civil Service Commission a special examination was held in December and a corps of ten dairy inspectors appointed, who were regularly on duty during the latter part of the year. One of these is a temporary appointment (P. 34) Four of these inspectors are not yet on duty during the whole of any one month, but the work in increasing and all will soon be needed for practically their entire time. They may continue, as now, to include in their duty such supervision as is necessary of dairy exports in general and conduct of special dairy investigations.

"These dairy inspectors constitute a body of men of rare experience in the production, testing, grading and handling of dairy products of all kinds, the detection of dairy adulterations, imitations and frauds, and the execution of dairy laws. It would be difficult to find, if needed, an equal number of men of like expert knowledge, skill and tried judgment.

"During the fiscal year 1902-03 these inspectors, assisted to some extent by the Chief and Assistant Chief of the Dairy Division, have repeatedly inspected 82 renovated butter factories and have visited 300 cities and towns in 45 states, territories and the District of Columbia for the purpose of ascertaining the extent to which renovated butter is distributed in domestic markets and the conditions under which this special commodity is sold at wholesale and retail.

"Factories to the number of 82 have been licensed and bonded by the Treasury Depaprtment for the manufacture of renovated butter. They were located in 17 States and the District of Columbia. Of these factories 28 have been in operation throughout the fiscal year, 23 commenced operations subsequent to July, 1902, and continued until the end of June, 1903, and 31 ceased manufacturing before the close of the year.

"The total quantity of renovated butter made at licensed factories during the fiscal year 1902-03 was 54,656,800 pounds. Of this amount about 500,000 pounds remained in possession of the manufacturers, taxes unpaid, at the close of the year. A close estimate of the like manufacture for the fiscal year 1901-02, being the next before the date when a tax was placed upon the product, and based largely upon factory records, shows the output to have been about 50,000,000 pounds, made at 55 factories.

"For the purpose of closer comparison of the product of the two fiscal years mentioned 10 factories have been selected, located in 6 States from which accurate records of the output of both years have been obtained: all were in operation twelve months in each year. The totals are as follows: Ten factories produced in 1901-02, 17,082,274 pounds; the same factories produced in 1902-03, 18,609,718 pounds.

"The business thus increased 9 per cent in volume. It is shown by this comparison, as well as by other facts

of record, that the law in question has not been obstructive and has proved no hindrance to manufacturers who have cheerfully acquiesced in its provisions and energetically conducted their business.

"During the first year of the operation of the law officers of the (P. 35) Department have inspected 144 different lots of renovated butter about to be exported to foreign countries, comprising 23,820 packages and approximately 1,312,000 pounds.

(The next paragraph relates to the retail trade and is omitted here.)

"The quality of renovated butter has been much improved. The difference between the average quality of the product during the past year and the same commodity a few years ago is very marked. This is due to improved machinery and processes, and also to the better average quality and condition of the packing stock or raw material used. The development of the business, with wider distribution and better organization and natural competition among manufacturers, have prevented the former accumulations of country butter at remote points, kept the stock comparatively well cleared up, and resulted in (P. 36) some improvements in packages, packing and transportation to factories or to markets. The average character and condition of the material used in this manufacture is therefore decidedly better than formerly. *Occasionally a lot of packing stock is found in such a condition of filth or putrefaction as to necessitate condemnation. In two instances material of this character has been manufactured before being seen, so the finished product had to be condemned as unfit for food. In such cases inspectors have required that material and product be disposed of as grease.* But these instances are very exceptional. There is still opportunty for great improvement in materials, in the manner of handling the same, and in the finished product, but, as a rule, manufacturers are endeavoring

to improve conditions at all points and are ambitious to win a reputation for producing an article of high quality.

"Renovated butter reaches market in various grades as to quality, the same as other butters. There are products, good, bad and indifferent from different factories and sometimes from the same factory. Renovated butter generally ranks as the equal of creamery butter of "seconds" grade in quality and price, and sometimes it is as good as creamery "firsts." Recently, when creamery "extras" (highest grade) were selling in New York at 20 cents wholesale, the best grade of renovated commanded 18 cents. One case is known where 700 packages of creamery butter of "firsts" grades were sold by the makers for 16½ cents per pound, when the same manufacturers were readily selling their best renovated product at 17 cents. The best renovated goods compare favorably with the general run of best dairy or farm butter in the market, although the latter usually sells a shade higher. The position of renovated butter in the general market is becoming more and more fixed."

(P. 37) "In the administration of that portion of the law regarding renovated butter which is assigned to the Department of Agriculture during this first year after going into effect many allowances have been made for errors and omissions in observing the regulations, due to the novelty of the subject, misunderstandings and inadvertence, and even in cases of indifference and negligence. It is believed that after one full year's experience in operating factories under the law, with repeated visits and explanations from inspectors, in addition to printed instructions and special correspondence, it is time more strictly to enforce the reasonable regulations and time to make the sanitary inspections more effective."

In the same Report of the Bureau of Animal Industry, commencing on page 177 is an interesting chapter entitled: FACTS CONCERNING THE HISTORY, COMMERCE AND MANUFACTURE OF BUTTER, by Harry G. Hayward, M. S., Ass't. Chief, Dairy Division.

Under the topic BUTTER SUBSTITUTES (page 193) it is said:

"At the present time there are three commercial substitutes for butter as it comes from the creamery or dairy churn. These are oleomargarine, butterine and renovated butter. These substitutes are manufactured and sold under the surveillance of the United States Government, and are subject to special taxes.

"Renovated Butter is made 'from one or more lots of butter which have been subjected to any process by which it is melted, clarified, or refined' for the purpose of removing rancidity, or any deleterious flavors, *or of otherwise improving and rendering uniform miscellaneous lots of butter which could not find a profitable market without being subjected to some such process of renovation.* It is understood that renovated butter is pure butter, *but is made from stock that in itself is not fit for table use.* The purpose of Government surveillance is to see that regulations are observed *whereby no unwholesome material* or process *is used* and so that the purchaser and consumer are advised as to the true character of this kind or grade of butter."

CERTIFICATE OF COUNSEL

I hereby certify that I have mailed the Attorney General of Alabama a copy of the foregoing brief at his post office address in Montgomery, Alabama, postage paid, on this ..... day of December, 1941.

.....

HORACE C. WILKINSON,
of Counsel for
Petitioner-Appellant.